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No. 99-1938

In the
Supreme Court of the United States

JOAN GORE MILLIGAN,
Individually and for the benefit and on
behalf of all others similarly situated,

Petitioner,

v.

STATE OF NORTH CAROLINA, *et al,*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF IN OPPOSITION

MICHAEL F. EASLEY
North Carolina Attorney General

Norma S. Harrell*, Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 716-6900

July 5, 2000

**Counsel of Record*

38pp

QUESTIONS PRESENTED

1. **WHETHER ANY ALLEGED CONFLICT BETWEEN THE DECISIONS OF THE NORTH CAROLINA APPELLATE COURTS AND THIS COURT'S DECISION IN *DEPARTMENT OF REVENUE OF MONTANA V. KURTH RANCH*, 511 U.S. 767 (1994), JUSTIFY GRANT OF THIS COURT'S WRIT OF CERTIORARI IN THIS CIVIL ACTION FOR A TAX REFUND.**

2. **WHETHER AN ALLEGED CONFLICT BETWEEN NORTH CAROLINA APPELLATE COURT DECISIONS AND THOSE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT CONCERNING DRUG TAXES JUSTIFY GRANT OF THIS COURT'S WRIT OF CERTIORARI IN THIS CIVIL ACTION FOR A TAX REFUND.**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

REASONS FOR DENYING THE WRIT 4

I. THIS COURT SHOULD NOT GRANT CERTIORARI IN THIS CIVIL ACTION FOR A TAX REFUND BASED ON ANY ALLEGED CONFLICT BETWEEN THE DECISIONS OF THE NORTH CAROLINA APPELLATE COURTS AND THIS COURT'S DECISION IN *DEPARTMENT OF REVENUE OF MONTANA V. KURTH RANCH*, 511 U.S. 767 (1994). 5

II. THIS COURT SHOULD NOT GRANT CERTIORARI BASED ON THE ALLEGED CONFLICT BETWEEN THE NORTH CAROLINA APPELLATE COURT DECISIONS AND THOSE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT 11

A. THIS CASE AND *LYNN V. WEST* DO NOT PRESENT A CONFLICT SUCH THAT THIS COURT SHOULD GRANT ITS WRIT OF CERTIORARI. 12

B. NORTH CAROLINA WAS NOT REQUIRED TO FOLLOW THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IN *LYNN* 14

CONCLUSION 16

APPENDIX

TABLE OF AUTHORITIES

CASES

ASARCO Inc. v. Kadish, 490 U.S. 605 (1989) 15

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 15

Brunner v. Collection Div. of the Utah State Tax Comm'n, 945 P.2d 687 (Utah 1997) 11

Bryant v. State, 660 N.E.2d 290 (Ind. 1995), *cert. denied*, 519 U.S. 926 (1996) 10

Commissioner of Revenue v. Mullins, 702 N.E.2d 1 (Mass. 1998) 11

Commonwealth v. Bird, 979 S.W.2d 915 (Ky. 1998), *cert. denied*, 526 U.S. 1145 (1999) 10

Covelli v. Commissioner of Revenue Servs. (Covelli I), 668 A.2d 699 (Conn. 1995), *vacated and remanded sub nom. Covelli v. Crystal*, 518 U.S. 1031 (for further consideration in light of *United States v. Ursery*, 518 U.S. 267 (1996)), *aff'd per curiam on reconsideration, Covelli v. Commissioner of Revenue Servs. (Covelli II)*, 683 A.2d 737 (Conn. 1996), *cert. denied*,

Covelli v. Crystal, 520 U.S. 1174 (1997) 9

Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994) ..... *passim*

Desimone v. State, 904 P.2d 1 (Nev. 1995), *vacated and remanded*, 518 U.S.1030 (1996), *affirmed on remand*, 996 P.2d 405 (Nev. 2000) .. 10

Ex parte Ward, 964 S.W.2d 617 (Tex. Crim. App.), *cert. denied*, 525 U.S. 823 (1998) 10

Fulton Corp. v. Faulkner, 516 U.S. 325 (1996) 3

Hill v. State, 898 P.2d 155 (Okla. Crim. App. 1995) 10

Lockhart v. Fretwell, 506 U.S. 364 (1993) 15

Lynn v. West, 134 F.3d 582 (4th Cir.), *cert. denied*, 525 U.S. 813 (1998) 4,11,13,14

Marbury v. Madison, 1 Cranch 137 (1803) 14

McMullin v. South Carolina Dep't of Revenue & Taxation, 469 S.E.2d 600, *reh'g denied* (S.C. 1996) 10

Milner v. State, 658 So. 2d 500 (Ala. Civ. App. 1994), *cert. denied* (Ala. 1995) 9

Padavich v. Thalacker, 162 F.3d 521 (8th Cir. 1998),
cert. denied, 527 U.S. 1025 (1999) 10

People v. Maurello, 932 P.2d 851
(Colo. App. Ct. 1997) 10

State v. Adams, 513 S.E.2d 588 (N.C. Ct. App. 1999),
disc. review denied, 350 N.C. 836,
__ S.E.2d __, *cert. denied*, __ U.S. __,
120 S. Ct. 534 (1999) 4,9,13

State v. Ballenger, 472 S.E.2d 572 (N.C. Ct. App. 1996),
aff'd per curiam, 481 S.E.2d 84 (N.C.),
cert. denied, 522 U.S. 817 (1997) ..... *passim*

State v. Creason, 473 S.E.2d 771 (N.C. Ct. App.1996),
aff'd per curiam, 484 S.E.2d 525 (N.C. 1997) 9

State v. Foster, 519 S.E.2d 783 (N.C. Ct. App.),
disc. review denied, 350 N.C. 840,
__ S.E.2d __, *cert. denied*, __ U.S. __,
120 S. Ct. 534 (1999) 4,9,14

State v. Gulledge, 896 P.2d 378 (Kan. 1995) 10

State v. Lange, 531 N.W.2d 108 (Iowa 1995) 10

State v. Stubblefield, 543 N.W.2d 743 (Neb. 1996) 10

State v. Wambach, 526 S.E.2d 212 (N.C. Ct. App. 2000) . 9

State v. Woods, 524 S.E.2d 363 (N.C. Ct. App. 2000) 9

Stennett v. State, 941 S.W.2d 914 (Tex. Crim. App. 1996), *reh'g denied* (Tex. Apr. 2, 1997) 10

Wilson v. Department of Revenue, 662 N.E.2d 415 (Ill. 1996) 10

OTHER

U.S. CONST., art. VI, §2 14

N.C. GEN. STAT. § 1A-1, Rule 12(b)(6) 2

N.C. GEN. STAT. § 105-113.105, *et seq.* 1

N.C. GEN. STAT. § 105-113.107 7

N.C. GEN. STAT. § 105-113.108 8

N.C. GEN. STAT. § 105-113.109 7

N.C. GEN. STAT. § 105-113.110A 13

N.C. GEN. STAT. § 105-113.112 8

N.C. GEN. STAT. § 105-236 13

N.C. GEN. STAT. § 105-267 1,3

STATEMENT OF THE CASE

Petitioner Joan Gore Milligan ("Milligan") filed this civil action on 6 July 1998 in the Superior Court of Wake County, North Carolina, against the State of North Carolina, the North Carolina Department of Revenue, the Secretary of the Department of Revenue, the Director of the Controlled Substance Tax Division of the Department of Revenue, the North Carolina Department of State Treasurer, and the Treasurer of the State of North Carolina (collectively hereafter "defendants"). Complaint, Appendix to Petition for Writ of Certiorari (hereafter "Pet. App.") at 11a. She claimed to seek tax refunds for herself, and others similarly situated, pursuant to N.C. GEN. STAT. § 105-267. Appendix to Brief In Opposition (hereafter "App.") at 5a.[1] The taxes for which she sought refunds were collected by the Department of Revenue based on statutory provisions imposing excise taxes on controlled substances, including marijuana, in the possession of "dealers" (hereafter referred to as the "Drug Tax"). *See* N.C. GEN. STAT. §§ 105-113.105 *et seq.*, Pet. App. at 27a-38a. On 10 August 1998, all defendants[2] joined in a motion to dismiss for failure to state a claim upon which relief may be granted pursuant to the North Carolina Rules of Civil Procedure, N.C.

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[1] The version of the statute set out in the Appendix to the Petition for Writ of Certiorari at 39a is incomplete, and thus defendants have included the relevant portion of the same statute in the Appendix to this document.

[2] Although Milligan stated in her Petition, at page 4, that the Attorney General of North Carolina acted on behalf of the Department of Revenue in successfully moving to dismiss her claim, the Attorney General in fact was acting on behalf of *all* the defendants.

GEN. STAT. § 1A-1, Rule 12(b)(6). That motion was renewed on 17 September 1998 in response to Milligan's Amended Complaint. The trial court granted defendants' motion to dismiss on 23 October 1998. Pet. App. at 9a-10a. Milligan appealed to the North Carolina Court of Appeals, and on 7 December 1999 that court filed its opinion affirming the trial court's dismissal of her claim. Pet. App. at 5a-8a. Milligan sought review by the North Carolina Supreme Court, and on 2 March 2000 that court denied her petition for discretionary review and granted defendants' motion to dismiss her appeal. Pet. App. at 1a-4a.

STATEMENT OF THE FACTS

This case is here on Milligan's Petition asking this Court to review the North Carolina Court of Appeals' decision affirming a North Carolina trial court's granting of a motion to dismiss for failure to state a claim for relief. Therefore, in considering the appropriateness of the judgment granting the motion to dismiss, the facts alleged in the Complaint must be assumed to be true. Nevertheless, defendants do not want to leave the mistaken impression that the factual allegations of the Complaint are conceded. At each stage of this proceeding, defendants have noted that they have certain defenses to Milligan's claim and certain disagreements with her allegations. Because defendants never answered the Complaint, the defenses and disagreements with Milligan's allegations have never been fully spelled out. However, defendants did file a motion for a protective order and to stay certain discovery requests made early in the litigation by Milligan. Defendants' Motion For A Stay Of Discovery And Protective Order Pursuant To Rule

26(c) Of The Rules Of Civil Procedure, App. at 7a-11a. Motion, defendants specifically noted that their defenses i "whether she in fact made a timely demand under N.C Stat. § 105-267, which is necessary to permit her to in this suit challenging the validity of the drug tax and se refunds" and "whether plaintiff has in effect waived her ri challenge the drug tax assessed against her by reach voluntary settlement of the assessment." App. at 8a. Court has previously acknowledged the requirements im by N.C. GEN. STAT. § 105-267 on challenges to tax la North Carolina. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 347 (1996).)[3] Defendants point out these circumstances s Court will not assume that defendants concede the truth o statements alleged in the Complaint. However, defendan not disagree with Milligan's Statement of the Facts whe "facts" set out therein are viewed solely as statements o

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[3] Under N.C. GEN. STAT. § 105-267, Milligan was required to a demand for refund, or "protest" the tax, within thirty (30) days of pay App. at 5a. Because the money was actually received by the Departm Revenue in 1997 and accepted as part of a settlement of three assess against both petitioner Joan Milligan and Jerry Milligan, defendants v challenge petitioner Joan Milligan's claim that she made a timely demar refund. Defendants would also challenge whether Joan Milligan is entitl seek a refund of taxes received and accepted to settle assessments against her and Jerry Milligan. Defendants would also contend that Milligan, thr the settlement of the assessments, has waived her right to challenge th under N.C. GEN. STAT. § 105-267. In other respects, as well, defenc would challenge the "facts" set out in the Complaint, such as the allegation she paid $8,000 on a single $12,252.95 assessment, Complaint, ¶¶ 19, 22, App. at 16a, when the $8,000 was actually accepted in resolution of t assessments totaling substantially more money.

allegations of the Complaint and statements of the North Carolina courts' rulings.

REASONS FOR DENYING THE WRIT

The petition should be denied because the North Carolina appellate courts' opinions that the State's Drug Tax is not a criminal penalty were not reached contrary to this Court's decision in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994). This Court has previously rejected all petitions seeking review of cases involving the North Carolina Drug Tax, including cases raising double jeopardy claims by persons challenging their criminal convictions. This case does not involve a challenge to Milligan's criminal conviction and breaks no new legal ground. Accordingly, there is no reason for the Court to review this case, especially after denying certiorari in several other cases. *See State v. Ballenger*, 472 S.E.2d 572 (N.C. Ct. App.1996), *aff'd per curiam*, 481 S.E.2d 84 (N.C.), *cert. denied*, 522 U.S. 817 (1997); *Lynn v. West*, 134 F.3d 582 (4th Cir.), *cert. denied*, 525 U.S. 813 (1998); *State v. Adams*, 513 S.E.2d 588 (N.C. Ct. App. 1999), *disc. review denied*, 350 N.C. 836, ___ S.E.2d___, *cert. denied*, ___ U.S. ___, 120 S. Ct. 534 (1999); *State v. Foster*, 519 S.E.2d 783 (N.C. Ct. App.), *disc. review denied*, 350 N.C. 840, ___ S.E.2d ___, *cert. denied*, ___ U.S. ___, 120 S. Ct. 534 (1999).

I. THIS COURT SHOULD NOT GRANT CERTIORARI IN THIS CIVIL ACTION FOR A TAX REFUND BASED ON ANY ALLEGED CONFLICT BETWEEN THE DECISIONS OF THE NORTH CAROLINA APPELLATE COURTS AND THIS COURT'S DECISION IN *DEPARTMENT OF REVENUE OF MONTANA V. KURTH RANCH*, 511 U.S. 767 (1994).

Milligan presents a case in which the only issue is whether she is entitled to a refund of taxes paid by her in an amount less than the assessment of which she was originally notified.[4] Her complaint is that, in her view, the Drug Tax she paid is actually a criminal penalty which can constitutionally be imposed only with the protections provided for criminal prosecutions. Accordingly, she claims that the Drug Tax was collected contrary to this Court's decision in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994). In that case, this Court held that Montana's drug tax was a second punishment for a criminal offense such that "[t]he proceeding Montana initiated to collect a tax on the possession of drugs was the functional equivalent of a successive criminal prosecution" and therefore "placed the Kurths in jeopardy a

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[4] The Complaint alleges that she "paid $8,000 as full payment on the Drug Tax assessment" which she alleges was in the amount of $12,252.95. Complaint, ¶¶ 19, 22, Pet. App. at 16a. For purposes of this argument, of course, the allegations are taken as true although, in a trial or summary judgment proceeding, defendants would dispute that the $8,000 was paid purely in compromise of the sole assessment she references.

second time 'for the same offense.'" *Kurth Ranch*, 511 U.S. at 784. Milligan, however, was not subjected to an independent proceeding by the State of North Carolina to collect the tax, as she paid a lesser amount in settlement following an assessment. Moreover, she ignores the differences between the North Carolina Drug Tax and the one evaluated by this Court in *Kurth Ranch*.

In *Kurth Ranch*, this Court cautioned that "[a]s a general matter, the unlawfulness of an activity does not prevent its taxation." *Kurth Ranch*, 511 U.S. at 778. Similarly, "a high tax rate and deterrent purpose . . . do not necessarily render the tax punitive." *Id.* at 781. Much more is required before a tax on the possession of drugs loses its intended character as a tax and becomes instead a criminal penalty. Two additional, "unusual features" of the Montana tax laws converted the tax in *Kurth Ranch* into a criminal penalty for double jeopardy purposes, and it was those unusual features that "set the Montana statute apart from most taxes." *Id.* First, the Montana drug tax was imposed on the commission of a crime because it was not owed unless and until the taxpayer had been arrested for criminal possession of the drugs. *Id.* Second, as a corollary to the fact that the tax was never owed until after the taxpayer's arrest, the tax was necessarily imposed only after the drugs had been confiscated and thus were no longer in the taxpayer's possession. *Id.* at 783.

In contrast to the Montana drug tax, North Carolina's Drug Tax is owed on *possession* of the requisite quantity of drugs; liability for the tax does not hinge on arrest and attaches at the time the dealer actually possesses the drugs and is payable

within forty-eight (48) hours after the dealer first possesses the drugs. N.C. GEN. STAT. §§ 105-113.107, 105-113.109, Pet. App. at 30a, 33a. Thus, in Milligan's case, she owed the Drug Tax when she was in possession of the marijuana found at her residence, prior to the time that law enforcement officers seized it and arrested her.

Because of the distinguishing features between the North Carolina tax and Montana's, the North Carolina appellate courts have consistently rejected all arguments that the Drug Tax constitutes a criminal penalty under the *Kurth Ranch* analysis. In *State v. Ballenger*, 472 S.E.2d 572 (N.C. Ct. App. 1996), *aff'd per curiam*, 481 S.E.2d 84 (N.C.), *cert. denied*, 522 U.S. 817 (1997), the North Carolina Court of Appeals first rejected the argument that the Drug Tax was a criminal penalty subject to double jeopardy analysis within the meaning of *Kurth Ranch*. The defendant in *Ballenger*, who was facing criminal charges for possession of marijuana with intent to sell or deliver, claimed he had already been placed in jeopardy by payment of a Drug Tax assessed against him for possession of the same marijuana. In rejecting Ballenger's double jeopardy argument, the North Carolina Court of Appeals recognized that North Carolina's drug tax, like the Montana tax, imposes an admittedly high rate of tax and serves a deterrent purpose, at least in part. The court nevertheless held that the Drug Tax was not a criminal penalty because the tax does not encompass either of the two unusual features which doomed the Montana tax. First, as noted in *Ballenger*, the Montana tax was not merely conditioned on criminal conduct; it was never owed unless and until the possessor of the drugs was arrested. As further noted in *Ballenger*, because the Montana tax was not

imposed until after the defendant was arrested and the drugs confiscated, the tax was imposed on drugs neither lawfully owned nor possessed by the taxpayer/defendant at the time the tax became due. *Kurth Ranch*, 511 U.S. at 783, *cited in Ballenger*, 472 S.E.2d at 574. In contrast, the North Carolina tax, due and owing within forty-eight (48) hours of possession,

> is not predicated upon whether the taxpayer in possession of the controlled substance has been arrested or charged with criminal conduct, nor is it assessed on property that necessarily has been confiscated or destroyed.

Ballenger, 472 S.E.2d at 574. Additionally, the North Carolina statute permits the dealer to pay the tax without revealing his identity and preserves the confidentiality of any information obtained as a result of payment. *Id.* at 575; *see also* N.C. GEN. STAT. § 105-113.108, Pet. App. at 32a; N.C. GEN. STAT. § 105-113.112, Pet. App. at 36a. Consequently, the North Carolina Court of Appeals concluded in *Ballenger*, and the North Carolina Supreme Court affirmed, that the North Carolina Drug Tax

> is a legitimate and remedial effort to recover revenue from those persons who would otherwise escape taxation when engaging in the highly profitable, but illicit and sometimes deadly activity of possessing, delivering, selling or manufacturing large quantities of controlled drugs.

Ballenger, 472 S.E.2d at 575. In several later cases, the North Carolina appellate courts have followed *Ballenger* and consistently rejected prisoners' claims of double jeopardy seeking freedom from their criminal convictions because of Drug Tax assessments. *See State v. Creason*, 473 S.E.2d 771, 772 (N.C. Ct. App. 1996), *aff'd per curiam*, 484 S.E.2d 525 (N.C. 1997); *State v. Adams*, 513 S.E.2d 588 (N.C. Ct. App. 1999), *disc. review denied*, 350 N.C. 836, ___ S.E.2d___, *cert. denied*, ___ U.S. ___, 120 S. Ct. 534 (1999); *State v. Foster*, 519 S.E.2d 783 (N.C. Ct. App.), *disc. review denied*, 350 N.C. 840, ___ S.E.2d ___, *cert. denied*, ___ U.S. ___, 120 S. Ct. 534 (1999); *State v. Woods*, 524 S.E.2d 363 (N.C. Ct. App. 2000); *State v. Wambach*, 526 S.E.2d 212 (N.C. Ct. App. 2000). The North Carolina appellate courts have thus appropriately applied *Kurth Ranch* in light of its emphasis on the significance of the "unusual features" of the Montana drug tax and have persuasively held that North Carolina's Drug Tax is not the kind of criminal penalty at issue in *Kurth Ranch*.

North Carolina's interpretation of its Drug Tax and application of *Kurth Ranch* are consistent with the decisions of numerous other state and federal courts holding similar statutes not to constitute criminal penalties. *See Covelli v. Commissioner of Revenue Servs.* ("*Covelli I*"), 668 A.2d 699 (Conn. 1995), *vacated and remanded sub nom. Covelli v. Crystal*, 518 U.S. 1031 (for further consideration in light of *United States v. Ursery*, 518 U.S. 267 (1996)), *aff'd per curiam on reconsideration, Covelli v. Commissioner of Revenue Servs.* ("*Covelli II*"), 683 A.2d 737 (Conn. 1996), *cert. denied*, *Covelli v. Crystal*, 520 U.S. 1174 (1997); *Milner v. State*, 658 So. 2d 500 (Ala. Civ. App. 1994), *cert. denied* (Ala. 1995);

State v. Lange, 531 N.W.2d 108 (Iowa 1995); *State v. Gulledge*, 896 P.2d 378 (Kan. 1995); *Commonwealth v. Bird*, 979 S.W.2d 915 (Ky. 1998), *cert. denied*, 526 U.S. 1145 (1999); *Hill v. State*, 898 P.2d 155 (Okla. Crim. App. 1995); *McMullin v. South Carolina Dep't of Revenue & Taxation*, 469 S.E.2d 600, *reh'g denied* (S.C. 1996); *see also Padavich v. Thalacker*, 162 F.3d 521 (8th Cir. 1998), *cert. denied*, 527 U.S. 1025 (1999) (holding Iowa "drug tax" is not a criminal penalty); *State v. Stubblefield*, 543 N.W.2d 743 (Neb. 1996) (distinguishing Nebraska statute from *Kurth Ranch* and holding that double jeopardy did not apply). On the other hand, several courts have held that various state "drug taxes" are criminal penalties within the scope of *Kurth Ranch*'s reasoning, often on grounds distinguishing them from North Carolina's tax. *E.g.*, *Wilson v. Department of Revenue*, 662 N.E.2d 415 (Ill. 1996) (holding that statute is written in such a way that a criminal conviction for a drug offense is necessary before one can determine that the drug tax applies);. *People v. Maurello*, 932 P.2d 851 (Colo. App. Ct. 1997) (no provision for confidential or anonymous payment, in contrast to North Carolina, Connecticut, and other states); *Bryant v. State*, 660 N.E.2d 290 (Ind. 1995), *cert. denied*, 519 U.S. 926 (1996) (statute requiring that the tax be paid every forty-eight (48) hours); *Stennett v. State*, 941 S.W.2d 914, 916 (Tex. Crim. App. 1996), *disc. hearing denied* (Tex. Apr. 2, 1997) (legislative history establishing that "the Texas tax was plainly and undoubtedly intended to be a punishment by the legislature that enacted it"); *accord Ex parte Ward*, 964 S.W.2d 617 (Tex. Crim. App.), *cert. denied*, 525 U.S. 823 (1998). *See also Desimone v. State*, 904 P.2d 1 (Nev. 1995), *vacated and remanded*, 518 U.S. 1030 (1996), *affirmed on remand*, 996 P.2d 405 (Nev. 2000);

Commissioner of Revenue v. Mullins, 702 N.E.2d 1 (Mass. 1998); *Brunner v. Collection Div. of the Utah State Tax Comm'n*, 945 P.2d 687 (Utah 1997).

In sum, North Carolina's decisions holding that its Drug Tax is not a criminal penalty are consistent with the decisions of many other courts addressing similar statutes. Because the North Carolina Drug Tax is highly distinguishable from the Montana tax at issue in *Kurth Ranch*, the decision in this case and the cases on which it relied, such as *Ballenger*, are in no way in conflict with *Kurth Ranch*. Milligan has offered the Court no good reason justifying the granting of the writ of certiorari in this case, and the Petition should therefore be denied.

II. THIS COURT SHOULD NOT GRANT CERTIORARI BASED ON THE ALLEGED CONFLICT BETWEEN THE NORTH CAROLINA APPELLATE COURT DECISIONS AND THOSE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Milligan contends that this Court should grant its writ of certiorari because the North Carolina Court of Appeals decisions in her case, and in other cases involving the Drug Tax, conflict with the decision of the United States Court of Appeals for the Fourth Circuit in *Lynn v. West*, 134 F.3d 582 (4th Cir.), *cert. denied*, 525 U.S. 813 (1998). She claims both that there is a direct conflict between her case and *Lynn*, which this Court supposedly needs to resolve, and also that this Court needs to

settle an alleged uncertainty as to whether state courts are required to follow the decisions of circuit courts of appeals which rule on cases from their states. On neither basis, however, has Milligan presented a good reason for this Court to grant certiorari.

A. THIS CASE AND *LYNN V. WEST* DO NOT PRESENT A CONFLICT SUCH THAT THIS COURT SHOULD GRANT ITS WRIT OF CERTIORARI.

Milligan would have the Court treat this case as directly in conflict with *Lynn* so that certiorari would be appropriate to address the conflict. Defendants, of course, submit that *Lynn* was itself incorrectly decided, but that the Court need not address that problem in this case, which was correctly decided by the North Carolina courts. In addition, Milligan ignores the fact that her case is significantly different from *Lynn* and does not present the type of direct conflict that led the Court to decide *Kurth Ranch*. In *Kurth Ranch*, this Court was dealing with a conflict between state and federal court decisions involving the same taxes on the same parties. Milligan cannot claim such a direct conflict as her claim to a tax refund has not been, and could not be, litigated in federal court. (The Eleventh Amendment would bar any refund claim brought in federal court, and the State is not seeking to collect further taxes from her.) Moreover, Lynn sought to protect himself from state proceedings to seize further assets in satisfaction of a Drug Tax assessment while Milligan seeks to obtain a refund of a tax she paid in settlement of a larger assessment.

This case differs from *Lynn* in other ways. Milligan, of course, was assessed taxes as a dealer in marijuana. *See* Complaint, ¶ 19, Pet. App. at 16a. She was also charged with a penalty of 50% of the assessment based on the statute applicable in 1996. *See* N.C. GEN. STAT. § 105-113.110A (1995), Pet. App. at 34a. In contrast, *Lynn* dealt with cocaine, with its separate tax provisions, and a penalty in the amount of 100% of the tax under the statute applicable at that time. *Lynn*, 134 F.3d at 584, 590.[5] That penalty has since been further reduced so there is now no special penalty for failure to pay the Drug Tax; instead, the penalty is ten per cent (10%), the same penalty generally applicable under North Carolina law for failure to pay taxes in a timely manner. N.C. GEN. STAT. §§ 105-113.110A and 105-236 (1999), App. at 1a, 3a.

Clearly, Milligan's case is substantially different from *Lynn*. It differs even more from the other cases in which this Court has chosen not to grant review, cases in which double jeopardy issues were raised challenging criminal convictions and punishments. *See State v. Ballenger*, 472 S.E.2d 572 (N.C. Ct. App. 1996), *aff'd per curiam*, 481 S.E.2d 84 (N.C.), *cert. denied*, 522 U.S. 817 (1997); *State v. Adams*, 513 S.E.2d 588 (1999), *disc. review denied*, 350 N.C. 836, ___ S.E.2d___,

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[5] In *Lynn* the Court of Appeals concluded that the tax was extremely high in relation to the value of the cocaine. 134 F.3d at 590. In both *Lynn* and this case, because they were decided at the trial level on motions to dismiss, there was no evidence in the record as to the value of the drugs in relation to the tax. In *Lynn*, however, the Court of Appeals sought to attach a value based on other cases, *id.*, a value which defendants never had a chance to disprove.

cert. denied, ___ U.S. ___, 120 S. Ct. 534 (1999); *State v. Foster*, 519 S.E.2d 783 (N.C. Ct. App.), *disc. review denied*, 350 N.C. 840, ___ S.E.2d ___, *cert. denied*, ___ U.S. ___, 120 S. Ct. 534 (1999). In all those cases, the issue of whether the Drug Tax constitutes a criminal penalty was presented far more concretely than in this case, yet the Court chose not to disturb those decisions. Milligan's tax refund action on her partially paid assessment does not offer the Court a sharp delineation of the issues or the direct conflict with *Lynn* that she claims. Accordingly, the differences between this case, and other North Carolina cases, and *Lynn*, offer no basis for this Court to grant its writ of certiorari in this case.

B. NORTH CAROLINA WAS NOT REQUIRED TO FOLLOW THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IN *LYNN*.

Milligan suggests that this Court should grant certiorari in order to resolve a perceived issue of whether the Supremacy Clause requires the North Carolina Supreme Court to follow decisions of the United States Court of Appeals for the Fourth Circuit. No such issue exists for this Court to resolve. The Supremacy Clause of Article VI, § 2 of the Constitution dictates that state courts' judges "shall be bound" by "the supreme law of the land," comprised of the Constitution, plus the laws and treaties of the United States. And it is this Court which has long been established as the final arbiter of the "supreme law of the land." *E.g.*, *Marbury v. Madison*, 1 Cranch 137 (1803). Federal district and circuit courts do not enjoy that status. Nor is their authority to interpret the Constitution superior to that of

the North Carolina courts. Instead, North Carolina's courts are *equally entitled "to render binding judicial decisions that rest on* their own interpretations of federal law." *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989). "In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located." *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring). In the unanimous decision of *Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997), Justice Thomas' explanation of this principle was cited with approval for the proposition that the "Supremacy Clause does not require state courts to follow rulings by federal courts of appeals on questions of federal law." Contrary to the assertions made in Milligan's Petition, then, this Court need not and should not grant certiorari to "resolve whether state courts are bound to follow circuit court decisions on matters of federal constitutional law." Petition, p. 16. Plainly, the Supremacy Clause does not dictate that North Carolina courts, or the courts of any other state, are required to follow the decisions of federal circuit courts of appeals, and this non-issue does not justify the granting of this Court's writ of certiorari.

CONCLUSION

Petitioner has offered no compelling reason for this Court to grant its writ of certiorari, and the Petition should be denied.

Respectfully submitted,

MICHAEL F. EASLEY
North Carolina Attorney General

Norma S. Harrell*
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
Telephone: (919) 716-6900

July 5, 2000

*Counsel of Record

APPENDIX
TABLE OF CONTENTS

North Carolina General Statutes § 105-113.110A. Administration. (current) 1a

North Carolina General Statutes § 105-236. Penalties. (current) 3a

North Carolina General Statutes § 105-267. Taxes to be Paid; Suits for Recovery of Taxes. (1996) 5a

Defendant's Motion for a Stay of Discovery and Protective Order Pursuant to Rule 26(c) of the Rules of Civil Procedure 7a

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North Carolina General Statutes § 105-113.110A. Administration. (current)

Article 9 of this Chapter applies to this Article. (1989 (Reg. Sess., 1990), c. 814, s. 7; 1995, c. 340, s. 1; 1997, c. 292, s. 1; 1998-218, s. 2.)

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North Carolina General Statutes § 105-236.
Penalties. (current)

Penalties assessed by the Secretary under this Subchapter are assessed as an additional tax. Except as otherwise provided by law, and subject to the provisions of G.S. 105-237, the following penalties shall be applicable:

* * *

(4) Failure to Pay Tax When Due. -- In the case of failure to pay any tax when due, without intent to evade the tax, the Secretary shall assess a penalty equal to ten percent (10%) of the tax, except that the penalty shall in no event be less than five dollars ($5.00). This penalty does not apply in any of the following circumstances:

a. When the amount of tax shown as due on an amended return is paid when the return is filed.

b. When a tax due but not shown on a return is assessed by the Secretary and is paid within 30 days after the date of the proposed notice of assessment of the tax.

* * *

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North Carolina General Statutes § 105-267. Taxes to be Paid; Suits for Recovery of Taxes. (1996)

No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. Whenever a person has a valid defense to the enforcement of the collection of a tax, the person shall pay the tax to the proper officer, and that payment shall be without prejudice to any defense of rights the person may have regarding the tax. At any time within the applicable protest period, the taxpayer may demand a refund of the tax paid in writing from the Secretary and if the tax is not refunded within 90 days thereafter, may sue the Secretary in the courts of the State for the amount demanded. The protest period for a tax levied in Article 2A, 2B, 2C, or 2D of this Chapter is 30 days after payment. The protest period for all other taxes is one year after payment.

* * *

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DEFENDANTS' MOTION FOR A STAY OF DISCOVERY AND PROTECTIVE ORDER PURSUANT TO RULE 26(c) OF THE RULES OF CIVIL PROCEDURE

[Filed: August 10, 1998]

[Caption omitted in printing.]

NOW COME the defendants to the above-captioned case, by and through their undersigned counsel, and move the Court for a stay of discovery and a protective order protecting them from being required to respond to plaintiff's attempted discovery unless and until such time as the Court has determined that defendants' motion to dismiss should be denied and that plaintiff is not individually barred from pursuing her claim. In support whereof, defendants show unto the Court the following:

1. Plaintiff brought this action pursuant to N.C. Gen. Stat. § 105-267, seeking a refund of "drug taxes" collected by the Department of Revenue under the North Carolina Controlled Substances Act, N.C. Gen. Stat. § 105-113.105 *et seq.*

2. Plaintiff's claim depends on whether she can successfully convince the Court of her theory that the "drug tax" is in reality a criminal penalty.

3. For reasons set out in DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, plaintiff cannot

succeed on her contention that the drug tax is in reality a criminal penalty.

4. Even if plaintiff could succeed on her contention that the drug tax is in reality a criminal penalty, defendants have several additional defenses against plaintiff's individual claim, defenses which may bar her from pursuing her own claim. These defenses include whether she in fact made a timely demand under N.C. Gen. Stat. § 105-267, which is necessary to permit her to institute this suit challenging the validity of the drug tax and seeking refunds. These defenses also may include whether plaintiff has in effect waived her right to challenge the drug tax assessed against her by reaching a voluntary settlement of the assessment.

5. Plaintiff has served on defendants Plaintiffs' First Set Of Interrogatories To Defendants (Exhibit A attached hereto), a Request For Production Of Documents (Exhibit B attached hereto), and a Request For Admissions (Exhibit C attached hereto). These requests are highly burdensome. In particular, the interrogatories seek a list of all taxpayers who have paid money or anything else of value pursuant to the North Carolina Controlled Substance Drug Tax, with each taxpayer's full name, last known address and telephone number, social security number, AN number, date and amount of the drug tax assessment, and the amount and date of any payment. The request for production of documents seeks production of all documents showing the above information as to each taxpayer who paid any money or anything else of value pursuant to the drug tax. As there may have been as many as ____ taxpayers who have had drug taxes assessed against them, the task of searching out, compiling, and producing the

information and documents sought would be extremely burdensome upon defendants and should not be required unnecessarily.

6. If plaintiff's action is dismissed as to her individual claim, or if she is barred from going forward as to her individual claim for failure to comply with N.C. Gen. Stat. § 105-267 or because she has waived her right to pursue this claim, she could not represent a class of alleged drug taxpayers. Consequently, defendants should not be required to undertake the highly burdensome task of responding to plaintiff's discovery, especially as it relates to potential class members, unless and until she, first, survives defendants' motion to dismiss and, second, survives defendants' subsequent motion, if necessary, concerning possible barriers to plaintiff proceeding with her individual claim.

7. Plaintiff's discovery requests also should be stayed because she is not entitled to receive the information she has sought concerning taxpayers who have not made themselves parties to this suit and who have not consented to her obtaining information about their tax status. Under N.C. Gen. Stat. § 105-259, defendants are prohibited from revealing tax information "from any source concerning the liability of any taxpayer for a tax" as defined in N.C. Gen. Stat. § 105-228.90. Under N.C. Gen. Stat. § 105-228.90, a tax includes any tax levied under Subchapters I, V, and VIII of Chapter 105 of the General Statutes. The drug tax imposed in N.C. Gen. Stat. § 105-113.105 *et seq.* falls within Subchapter I of Chapter 105 of the General Statutes. Consequently, defendants are forbidden to reveal the information sought by plaintiff except under certain circumstances, such as a court order, none of

which are applicable here. *See* N.C. Gen. Stat. § 105-259(b). Thus, this Court should stay plaintiff's discovery request because she seeks confidential information about taxpayers who have not consented to her having that information. Information about individual taxpayers should only be required from defendants if plaintiff first survives the obstacles to her proceeding with her individual claim and then only under an appropriate court order which limits the information sought. Such a limitation should reduce the burden on the defendants as to what information should be made available and should restrict plaintiff's request to those taxpayers whose claims would not be time-barred. Further, if defendants are required to provide such information at all, it should only be under restrictions of confidentiality as ordered by this Court to comply with N.C. Gen. Stat. § 105-259 and to protect the confidentiality of the potential class members.

WHEREFORE, defendants urge this Court to stay all discovery sought by plaintiff, including Plaintiffs' First Set Of Interrogatories To Defendants, plaintiff's Request For Production Of Documents, and plaintiff's Request For Admissions pending determination of defendants' motion to dismiss and, should the Court deny the motion to dismiss, determination of other issues concerning plaintiff's entitlement to bring this lawsuit. Moreover, the Court should enter a protective order staying plaintiff's discovery requests until after determination of the issues concerning her right to pursue this litigation and then allowing the discovery only upon entry of a proper subsequent protective order limiting the requests to potential class members, limiting the information to be concerning individual taxpayers, and protecting the

confidentiality of that information in the possession of plaintiff and her counsel.

Respectfully submitted, this the 10th day of August, 1998.

MICHAEL F. EASLEY
ATTORNEY GENERAL

/s/ Norma S. Harrell
Special Deputy Attorney General
State Bar No. 6654

/s/ Hampton Y. Dellinger
Special Counsel to the Attorney General
State Bar No. 19903

/s/ Christopher E. Allen
Assistant Attorney General
State Bar No. 17315

North Carolina Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602-0629
(919) 716-6900

Attorneys for Defendants

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